proceedings to such an extent that as a result many persons might be misled as to its true character. I do not wish my participation herein to be the occasion of another delay in a case which has been plagued by too many procedural pitfalls since its inception.

TEXAS INDUSTRIES, INC.

Docket 8656. Order, May 18, 1965

Order denying respondent's request that the Commission furnish respondent with special reports obtained in the Commission's industrywide investigation of the cement industry.

ORDER DENYING MOTION FOR PRODUCTION OF DOCUMENTS

On April 22, 1965, counsel for respondent in the above-captioned proceeding filed with the hearing examiner a motion for production of documents pursuant to Section 3.11 of the Commission's Rules of Practice (effective August 1, 1963). Respondent, by this motion, sought to have produced for its inspection and copying certain Special Reports submitted to the Commission in response to orders issued under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), pursuant to a resolution of the Commission dated December 1, 1964, directing an investigation of corporations engaged in the production and distribution of portland cement. On April 28, 1965, complaint counsel filed an answer in opposition to respondent's motion. The hearing examiner determined that he did not have the authority to rule upon respondent's motion. Accordingly, pursuant to Section 3.6(a) of the Rules of Practice the examiner on May 5, 1965, certified respondent's motion to the Commission, recommending that the motion be denied.

The examiner acted correctly in certifying for the Commission's determination a motion seeking the production of material obtained by the Commission through the exercise of its investigatory powers under Section 6(b) of the Federal Trade Commission Act and placed in the Commission's confidential files. See *L. G. Balfour Co.*, F.T.C. Docket 8435 (Interlocutory Opinion, May 10, 1963) [62 F.T.C. 1541]. In the *Balfour* opinion the Commission explained in detail the considerations bearing on whether to release material from the Commission's confidential files for use by a respondent in preparing his defense in a Commission adjudicative proceeding. The Commission emphasized (p. 1546) that the question of whether to release such materials in a particular case "should be met with flexibility and discretion, not rigid formula," and that a determination of the question would depend

disposed of more expeditiously if the Commission proceeding were kept purely investigative in form as well as substance prior to assumption of jurisdiction by the courts in enforcement proceedings. The Commission could request enforcement simply by affidavit or other appropriate pleading and at that point the courts are in the best position to specify the nature of and ground rules for the hearing, on the basis of which they must exercise their judicial function in determining whether the order should be enforced.[5]

This history of this proceeding makes it abundantly clear that the distinction between adjudicative and investigative hearings should be kept well-defined. As far as can be determined after two years of procedural maneuvering, the investigation is very little, if any, closer to resolution than at its inception. The Commission should take heed of the Supreme Court's warning that the investigative process can be completely disrupted if investigative hearings are transformed into trial-like proceedings and that burdening of investigative proceedings with trail-like procedures may render them sterile.[6] Here it is evident that the procedures governing this investigation have become ossified to the point where the Commission, the examiner, and counsel alike are in danger of losing sight of the fact that flexibility is at once the goal and justification of the administrative process.

The significance of what has happened here lies not so much in the sphere of enforcement of Commission orders under the Clayton Act; with the passage of the Finality Act in 1959, in all likelihood there will be a diminution of such proceedings. The implications of this case, however, should be carefully examined by the Commission in the context of all its investigative proceedings, for the record makes it plain that where an inherently investigative proceeding is given an adjudicative form, the result may well be an exercise in contrived futility.

In any event, I intend to refrain from participating further in this proceeding, either in ruling on the scope of this investigation or ultimately on the question of whether the Commission should apply to a court of appeals for affirmance and enforcement. Recent developments have made it clear to me that putting a hearing examiner in charge of investigative hearings tends to compromise both his position and the nature of the proceeding. As I have noted above, this essentially administrative matter has now taken on the appearance of adjudicatory

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[5] It has apparently been hitherto the "usual practice" if the assertion of violation is disputed for the court to remand the matter to the Commission for formal proceedings *F.T.C.* v. *Washington Fish & Oyster Co., supra* n. 2, at 42 [6 S.&D. 666, 669].

[6] *Hannah* v. *Larche,* 373 U.S. 420, 443, 448 (1960) ; see also *F.C.C.* v. *Schreiber,* 329 F. 2d 517, 526 (9th Cir. 1964), *cert. granted,* 379 U.S. 927 (1964). As I noted in my dissent in *Mead Corporation,* File No. 571 0656, issued January 3, 1963 with respect to a similar situation, "I shall not join in this game of hare and hounds, where the facts are to be cornered only after the long and perhaps never-ending chase * * *".

reason to believe, their expectation and understanding that these Reports would not be released for the use sought in the present motion for production.

While we have determined that there is a very substantial public interest in not releasing the Special Reports in question to respondent in this case, we would do so if the needs of basic fairness so dictated. They do not. As noted above, no part of these Reports has been or will be turned over to complaint counsel to be introduced as evidence in this proceeding. Since no part of these Reports will become evidence in this proceeding, denial of access to them on the part of respondent is not a case of the Commission's denying a respondent "access to evidence which it controlled." *Union Bag-Camp Paper Corp.* v. *F.T.C.*, 233 F. Supp. 660, 666 (S.D. N.Y. 1964) [7 S.&D. 991, 998]. As the hearing examiner noted in his certification of May 5, 1965, recommending that the Commission deny respondent's motion for production, "the nature, outline and substance of the evidence upon which [complaint counsel] * * * intend to rely will be fully disclosed to respondent before the hearings begin." All evidence in the possession of complaint counsel will be subject to full discovery, which, under the Commission's Rules of Practice, is available to respondent as well as to complaint counsel. Therefore, we do not see how denying respondent production of the Special Reports obtained in the Commission's industrywide inquiry can materially prejudice respondent in preparing and conducting its defense to the complaint.

The court in the *Union Bag-Camp* case, cited above, held that the Section 6(b) procedure for obtaining information and data is an extraordinary power vested in the Federal Trade Commission as an agency charged with protecting the public interest, and was not intended by Congress to be available as a matter of right to private parties in preparing their defense in proceedings before the Commission. Just as a respondent cannot compel the Commission to conduct a Section 6(b) survey on his behalf, so he may not compel the Commission to turn over to him the fruits of such a survey where it has not been conducted by the Commission for the purpose of aiding in the prosecution of the case against respondent, and where release of the material obtained in the 6(b) inquiry would interfere with the Commission's effective performance of its statutory functions and duties. Here the only basis for respondent's motion for production is that the Special Reports may contain material that would be relevant or helpful in the preparation of its defense, and for the reasons stated, such a ground is, in the circumstances, insufficient. Accordingly,

It is ordered, That respondent's motion for production of documents dated April 22, 1965, be, and it hereby is, denied.

Commissioner MacIntyre not participating.

on all of the relevant facts. The Commission also stated: "In general, however, it may be said that an applicant must satisfy the Commission not only that the material sought is relevant and useful for defensive purposes, but also that its release would not impair any overriding public interest in preserving its confidentiality. In making its judgment the Commission will also necessarily take into account such considerations as basic fairness to the parties * * *." *Ibid.* Applying the criteria of the *Balfour* opinion to the present facts, the Commission has determined that respondent's motion for production of documents must be denied.

There is an overriding public interest in preventing the release of the Special Reports obtained through Section 6(b) orders in the Commission's industrywide investigation of cement producers from confidential status for use in this adjudicative proceeding. These Special Reports, submitted by fifty portland cement manufacturers, are an integral and important part of a broad administrative inquiry into certain serious and prevalent competitive problems of the cement industry (see the Commission's press release of December 7, 1964, announcing commencement of the inquiry)—an inquiry that is still continuing. The Reports have not been and will not be made available to complaint counsel for use as evidence in the present case. The concern of the inquiry, as the Commission explained in its order of April 14, 1965 [p. 1363 herein], in the above-captioned proceeding, denying respondent's motion to suspend the complaint, is "with preventing future unlawful mergers, by providing businessmen with guidance as to the probable legality of proposed mergers," and not with gathering evidence to be used in adjudicating the legality of already consummated mergers, such as the one challenged in this case.

The Commission's ability to conduct a sound and comprehensive industrywide inquiry in the cement industry and complete it with reasonable expedition is likely to be seriously impaired by releasing the Special Reports obtained in the inquiry for use in adjudicative proceedings such as the present one. Such release would be likely to engender resistance on the part of the companies filing the reports to further requests or demands by the Commission for information, and to seriously retard voluntary and constructive collaboration between the Commission and the industry in obtaining facts and data necessary to the industrywide inquiry. For much of the information contained in these Reports is highly confidential, and the parties filing the Reports would be extremely reluctant to see such information find its way into the hands of competitors, or into the public record of this adjudicative proceeding. The substantial cooperation the Commission has received from the reporting companies reflects in part, we have

York membership corporation, and that said International Paper Company Foundation has sold or contracted to sell said 5,000 shares to a purchaser or purchasers to whom International Paper Company would have been entitled to sell the same under the terms of the Commission's order of June 25, 1957.

MODERN MARKETING SERVICE, INC., ET AL., Docket 3783
C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY, *Docket 4589*

Orders, June 2, 1965

Order broadening an earlier order authorizing an investigation, denying a motion to terminate and for oral argument, and dismissing motion to disqualify Commissioner MacIntyre as moot.

ORDER BROADENING INVESTIGATION, DENYING MOTION TO TERMINATE AND FOR ORAL ARGUMENT, AND DISMISSING MOTION TO DISQUALIFY COMMISSIONER MACINTYRE AS MOOT

The hearing examiner appointed to preside over the investigational hearings in Docket No. 4589 has certified to the Commission a motion by Commission counsel for an amendment of the order directing the investigation. Respondents have submitted an answer opposing that amendment, a motion of their own "to terminate this proceeding," a motion for oral argument on both Commission counsel's request for amendment and their own motion to terminate, and a motion requesting that Commissioner A. Everette MacIntyre be disqualified from further participation in the proceeding.

The order in question, issued by the Commission on February 1, 1963 [62 F.T.C. 1486], directed an investigation to determine whether respondents have violated the provisions of a cease and desist order entered by the Commission under Section 2(c) of the amended Clayton Act, 15 U.S.C. 13(c), in a proceeding entitled *In the Matter of C. H. Robinson Company and Nash-Finch Company*, Dkt. 4589, 43 F.T.C. 297, 301–303 (1947). The substance of that order is that Robinson, a wholly owned subsidiary of Nash-Finch, is prohibited from accepting brokerage payments on its own or its parent's behalf, and Nash-Finch, a wholesale dealer in various fruit and vegetable products, is prohibited from receiving such brokerage payments through or from that subsidiary.

Commission counsel requests that the investigation be broadened to include, in addition to the question of whether respondents have violated that 1947 order, the further question of whether respondent Nash-Finch has also violated an earlier order issued by the Commission, *In re Modern Marketing Service, Inc., et al.*, Dkt. 3783, 37 F.T.C.

INTERNATIONAL PAPER COMPANY

Docket 6676. Order, June 1, 1965

Order granting consent to respondent corporation to transfer 5,000 shares of Longview Fibre Company stock held in the voting trust.

ORDER CONSENTING TO THE TRANSFER OF 5,000 SHARES OF LONGVIEW FIBRE COMPANY STOCK HELD IN THE VOTING TRUST

Whereas, the Commission by order issued June 25, 1957 [53 F.T.C. 1192], in the above entitled matter ordered International Paper Company to divest itself absolutely, in good faith, within ten years, of all stock in Longview Fibre Company which was acquired through the merger of The Long-Bell Lumber Corporation and The Long-Bell Lumber Company with respondent; and

Whereas, pursuant to said order as an initial step in such divestiture International Paper Company with the Commission's approval transferred said stock, *viz.*, 160,000 shares to The Hanover Bank, as voting trustee under a Voting Trust Agreement dated August 29, 1957, between the International Paper Company and said Bank, in a form approved by the Commission; and

Whereas, said voting trust agreement provides for transfer of any or all of said shares to International Paper Company on the Commission consenting thereto or on certification by International Paper Company to said Bank that it has sold or contracted to sell the same in accordance with the terms of the order; and

Whereas, International Paper Company has petitioned the Commission to consent to the transfer to it (under appropriate safeguards for carrying out the requirements of the Commission's Order) of 5,000 shares of the 14,000 shares of capital stock of Longview Fibre Company now in the hands of the Voting Trustee, in connection with the donation of such shares to the International Paper Company Foundation, a nonprofit corporation incorporated in 1952 under the Membership Corporations Law of New York to receive funds exclusively for religious, charitable, scientific, literary and educational purposes;

Now therefore, upon consideration thereof,

It is ordered, That consent is hereby given to the transfer pursuant to the said Voting Trust Agreement, by The Hanover Bank to the International Paper Company, of 5,000 shares of capital stock of Longview Fibre Company held by said Bank as Voting Trustee under said Voting Trust Agreement upon the certification of International Paper Company to said Bank by an instrument signed by its president or vice president that it has assigned all its right, title and interest in said 5,000 shares to International Paper Company Foundation, a New